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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WELLS FARGO BANK, N.A., Plaintiff and Respondent, v. THE BEST SERVICE COMPANY, INC., Defendant and Appellant.	B283990 (Los Angeles County Super. Ct. No. BC522081)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Law Offices of Clark Garen, Brian Craig Nelson and Clark Garen for Defendant and Appellant.

Squire Patton Boggs, Daniel H. Wu and Nathaniel K. Fisher for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and cross-complainant The Best Service Company, Inc. appeals from a judgment in favor of plaintiff and cross-defendant Wells Fargo Bank, N.A. following a grant of summary judgment for plaintiff on its complaint, the sustaining of plaintiff's demurrer to defendant's second amended cross-complaint, and a denial of summary judgment for defendant on the third amended cross-complaint. We affirm.

II. BACKGROUND

A. *The Parties' Agreements*

Among its financial services, plaintiff extends loans and credit facilities, which from time to time go into default. Plaintiff enters into agreements with debt collection agencies for the collection of funds on defaulting accounts. Defendant is one of those collection agencies.

The parties signed a series of agreements in 1999, 2006, and 2008. The agreements shared many terms. For example, all started with "Introductory Recitations" stating that certain of plaintiff's accounts had become "problem accounts" and "[c]ertain categories of delinquent accounts are assigned to third party collection agencies . . . for collection." The agreements required defendant to make its best efforts to collect the full amounts of the defaulting accounts, deposit the collections in a trust account for the benefit of plaintiff, and then pay collections from the trust account to plaintiff monthly. The agreements authorized defendant to initiate legal collection actions at defendant's sole

expense with defendant generally liable for paying attorney fees and costs for those legal actions.

1. Payment Terms

Pertinent here are the payment terms. The main body of the agreements did not set forth how defendant was to be paid for its services. Rather each agreement included an attachment with such terms. The first agreement signed in 1999 and titled "Wells Fargo Bank's Servicing Agreement" (1999 agreement) contained an attachment stating in part: "Beginning with placements in April, 1999, each contingency fee be [*sic*] based on the dollars collected, as follows: [¶] Prime Placements 28 [percent] [¶] Primes with Legal Action taken by Servicer 40 [percent] . . . ."

The second agreement was signed in 2006 and was titled "Third Party Servicing Agreement" (2006 agreement). It contained an attachment with the heading "Purchase Strategy." The attachment stated in part: "Each Purchase Price be [*sic*] based on the dollars collected and a final payment at the end of the purchase term based on the placement level. [¶] All accounts which begin a payment stream, or settle with a lump sum payment, enter into the purchase agreement as described in this document. [¶] The purchase price of the accounts are [*sic*] dependant [*sic*] on the level of placement as follows: [¶] Prime Placements [¶] For the first 36 months, 28 [percent] of all payments made on accounts without legal action initiated and 40 [percent] on accounts with legal action initiated. In month 37 the final payment will be $.02 per dollar of the remaining balance on the account."

The third agreement was signed in 2008 and was titled "Servicing Agreement" (2008 agreement). Its attachment was

headed "Attachment A—Collection Services" and had its own attachment, "Exhibit 1 to Attachment A." Exhibit 1 to Attachment A stated in part: "1. Purchase Pricing [¶] A. Terms [¶] Each Purchase Price shall be based on the dollars collected and a final payment at the end of the purchase term based on the placement level. [¶] All accounts which begin a payment stream, or settle with a lump sum payment, enter into the purchase agreement as described in this Agreement. [¶] The purchase price of the accounts is dependent on the level of placement as follows: [¶] Prime Placements [¶] For the first 36 months, 28 [percent] of all payments made on accounts without legal action initiated and 40 [percent] on accounts with legal action initiated. In month 37, the final payment shall be $.02 per dollar of the remaining balance on the account."

2. Sale of Accounts

The three agreements also contained provisions for the sale of accounts to defendant. In the 2008 agreement, plaintiff "agrees to sell to [defendant] and [defendant] agrees to purchase from [plaintiff] at the time established by [plaintiff] ('Sale Date'), all Accounts consigned to [defendant] 36 or more months previously." Under the heading "Determination of Sale Date" was stated: "Sale Dates will be monthly based on the consignment of Accounts to the Vendor." The agreement further stated: "The consideration for the sale shall be all debtor remittances, net of [defendant's] fee, paid on the Account up to the Sale Date, plus $.02 per dollar of the of [*sic*] Account balance the first business day of the 37th month after placement." After each sale, defendant was to "take all responsibility for future maintenance and reporting of the Account status to credit

bureaus, the IRS, and any other required reporting." The 1999 and 2006 agreements contained materially similar terms.

3. Termination

The 2008 agreement allowed plaintiff, "in its sole discretion," to "change any term or condition of" Attachment A by providing notice to defendant. If the defendant did not accept the change, the agreement "shall terminate immediately, as set forth in Paragraph 9 (C) below." Paragraph 9 (C) required plaintiff to pay defendant's operating expense fees for collections received for a 30-day period.

B. *The Parties' Course of Conduct*

The parties agree that from 1999 to at least the beginning of this dispute in 2013, the change in the language of the payment terms from the 1999 agreement to the 2006 and 2008 agreements did not affect the amount of collections that defendant retained for itself and the amount it remitted to plaintiff. During that entire time, defendant retained 28 percent of collections on accounts with no legal action and 40 percent on accounts with legal action, and turned over the remaining 72 percent and 60 percent respectively to plaintiff. The parties also agree that the remittances continued beyond the 36th month after an account was consigned to defendant. Plaintiff apparently stopped consigning accounts to defendant in 2008, so the last month 36 was in 2011 at the latest.

In 2013, defendant was sold. In mid-2013, defendant proposed that it "exercise its option to purchase the Wells Fargo Accounts under our current agreement," noting "[p]er our

agreement, the purchase price is 2 [percent]." Defendant said it was "prepared to fund the transaction immediately." On August 13, 2013, plaintiff notified defendant that plaintiff was modifying the 1999, 2006, and 2008 agreements to delete the provisions for the sale of accounts to defendant. Defendant rejected the modification, stating that if plaintiff intended to terminate the agreements, plaintiff owed defendant the attorney fees and costs incurred in collecting on the accounts. Defendant reiterated it was "prepared to purchase the accounts pursuant to the agreement and . . . to allow [plaintiff] to terminate the accounts under the agreement so long as [plaintiff] is prepared to reimburse [defendant] for its attorney fees and court costs."

Plaintiff responded that because defendant was not accepting the modification, the agreements were terminated as of August 15, 2013, and pursuant to paragraph 9 (C) of Attachment A, plaintiff owed defendant only the operating expense fees for 30 days.

C. *The Litigation*

On September 20, 2013, plaintiff filed a complaint seeking a declaration that the three agreements were terminated as of August 15, 2013, and a injunction requiring defendant to return the accounts and confidential information to plaintiff. On April 7, 2015, defendant filed a cross-complaint asserting causes of action for breach of contract, fraud, rescission, unfair business practices and violation of RICO, as well as a declaration that defendant had already purchased the accounts and in fact had overpaid and was entitled to a refund of about $3.7 million. Plaintiff demurred to the cross-complaint, and the trial court dismissed the RICO claim. Defendant filed a first amended

cross-complaint dropping the RICO claim and adding a request for a constructive trust.

After the court sustained another demurrer to the declaratory relief, rescission, and fraud causes of action, defendant filed a second amended cross-complaint alleging causes of action for breach of contract and an involuntary trust based on assertions that defendant was entitled to keep all amounts collected on accounts after month 36 and had mistakenly remitted too much to plaintiff. Another demurrer ensued. At the hearing, defendant argued it either already owned the accounts or was entitled to keep servicing the accounts. The trial court sustained the demurrer, reasoning that defendant's alleged over-remittance to plaintiff could not be a breach by plaintiff. To address the claim that defendant had overpaid plaintiff, the court allowed defendant to file a third amended cross-complaint consisting only of an accounting cause of action. Plaintiff answered the third amended cross-complaint, and both parties moved for summary judgment on their own pleadings.

Defendant argued the 2006 and 2008 agreements changed the payment terms of the 1999 agreement and required defendant to remit to plaintiff only 28 percent and 40 percent of collections on accounts without and with legal action respectively (not the 72 percent and 60 percent it had been paying since 1999) and that therefore, defendant had overpaid plaintiff by $4,467,521. Defendant contended it discovered the overpayments in June 2014. Defendant explained the years of alleged overpayments by claiming its former owner had not read the 2006 and 2008 agreements and did not understand the payment terms had changed, even though he signed both. Defendant's general counsel submitted a declaration stating that no one at

defendant was aware of the changes in the 2006 and 2008 agreements or the overpayments until June 2014 when he began preparing defendant's cross-complaint.[1] Defendant also argued that the 2008 agreement required it to pay 2 percent of an account's balance in month 37 and thereafter allowed defendant to keep all the amounts it collected on that account. Defendant contended that due to the overpayments, it had in effect made the 2 percent final payment on all accounts in 2004 and since that time had been entitled to keep all the amounts collected.

Plaintiff argued defendant was obligated to remit, and did remit, 72 percent and 60 percent of collections even after the litigation began, and defendant did not own the accounts because defendant had not exercised its option to purchase any account in month 37 by paying 2 percent and taking over responsibility for future maintenance and reporting of account status. Instead, defendant had continued servicing the accounts and remitting collections to plaintiff. Plaintiff submitted the deposition testimony of defendant's owner during the relevant time period that defendant had not purchased any accounts. He testified that under the 2006 and 2008 agreements, defendant retained 28 percent on accounts without legal action and 40 percent on account with legal action and remitted 72 percent and 60 percent to plaintiff.[2] Plaintiff also argued the 2008 agreement allowed it to terminate after defendant rejected the modification.

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[1] The trial court sustained objections to this testimony on the ground that it was an improper legal conclusion.

[2] The witness later submitted an extensive deposition errata sheet stating he misunderstood the questions about how much was to be remitted, and "when [he] actually read [them], these

During the summary judgment hearing, counsel for defendant acknowledged defendant had not taken responsibility for all further maintenance and reporting of account status. But he argued that whether defendant had purchased the accounts or was continuing to service the accounts, it was entitled to retain the full amount of collections because the 2008 agreement did not require any further remittances after the 2 percent payment in month 37.

The court granted summary judgment for plaintiff and denied it for defendant. It concluded the conditions precedent and subsequent to the sale of accounts had not occurred and defendant did not own the accounts. The court declared the three agreements terminated effective August 15, 2013. It ordered defendant to return all accounts and confidential information to plaintiff, stop collecting on the accounts, provide an accounting, transmit to plaintiff all amounts collected on the accounts after the termination date, and take nothing on its accounting cause of action against plaintiff. It ordered plaintiff to pay defendant its operating expense fees for 30 days.

III. DISCUSSION

A. *Standard of Review*

Defendant contends the trial court erred in sustaining the demurrer to the second amended cross-complaint without leave to amend (except for allowing an accounting cause of action) and granting plaintiff's motion for summary judgment.

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two agreements do not clearly state which entity is to get which percentage."

In reviewing a grant of demurrer without leave to amend, "courts must assume the truth of the complaint's properly pleaded or implied factual allegations." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) "If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Ibid.*)

In reviewing a grant of summary judgment, "'we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] "'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. [Citation.]' [Citation.]" (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206.)

B. *Contract Interpretation*

The material facts here are undisputed. Defendant's claims turn on conflicting interpretations of the 2006 and 2008 agreements. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of

contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) "[T]he intention of the parties as expressed in the contract is the source of contractual rights and duties." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage ETC. Co.* (1968) 69 Cal.2d 33, 38 (*Pacific Gas*).) "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638.)

Extrinsic evidence may be considered to determine whether the contract is ambiguous, and if after considering the extrinsic evidence the contract "'is fairly susceptible of either one of the two interpretations contended for' [citations], extrinsic evidence relevant to prove either of such meanings is admissible." (*Pacific Gas, supra*, 69 Cal.2d at pp. 39-40; see also *Hot Rods, LLC v. Northrop Grumman Systems Corp.* (2015) 242 Cal.App.4th 1166, 1175-1176 ["[E]xtrinsic evidence can be admitted to explain the meaning of the contractual language at issue, although it cannot be used to contradict it or offer an inconsistent meaning. The language, in such a case, must be "'reasonably susceptible"' to the proposed meaning"].) Interpretation of a contract based on undisputed extrinsic evidence is a "judicial function." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.)

One type of such extrinsic evidence is the parties' course of conduct. "In construing contract terms, the construction given the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy arises as to its meaning, is relevant on the issue of the parties' intent." (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242.) "The conduct of the parties after execution of the contract and before any

controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions." (*Kennecott Corp. v. Union Oil Co.* (1987) 196 Cal.App.3d 1179, 1189; see also *Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754 ["When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent"].)

1. Payment Terms

In their briefs, the parties disagree on what the agreements say about the amount of collections defendant was to remit to plaintiff.

Defendant maintains that the 2006 and 2008 agreements changed the payment terms of the 1999 agreement. Whereas the 1999 agreement required defendant to remit to plaintiff 72 percent of amounts collected on accounts without legal action and 60 percent on accounts with legal action and allowed defendant to retain 28 percent and 40 percent, defendant asserts the 2006 and 2008 agreements flipped the numbers and required remittance of 28 percent and 40 percent and allowed defendant to retain 72 percent and 60 percent. Based on this interpretation, defendant contends it overpaid plaintiff by $4,154,274 because it consistently remitted 72 percent and 60 percent even after the 2006 and 2008 agreements were signed.[3]

Plaintiff contends that under all three agreements, defendant was required to remit 72 percent and 60 percent on

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[3] Defendant advanced various other overpayment amounts in the trial court.

accounts without legal action and with legal action respectively and could retain 28 percent and 40 percent.

Consideration of the language of the 2006 and 2008 agreements, as well as the parties' conduct until (and even after) their dispute arose, leads to the conclusion that the agreements on their face are ambiguous. The language about the amounts defendant was to remit and retain does not explicitly state which party was to receive 72 percent and 60 percent of collections and which was to receive 28 percent and 40 percent. However, the parties' conduct clarifies the ambiguity and reveals the contract is reasonably susceptible to plaintiff's interpretation. The parties agree defendant consistently remitted 72 percent and 60 percent to plaintiff and retained 28 percent and 40 percent.

The parties' conduct makes sense. Defendant gives no reason why the payment amounts would have flipped from the 1999 agreement to the 2006 and 2008 agreements. The parties' relationship appears to have been essentially the same during all of those years, with defendant performing collection services for plaintiff. Further, flipping the amounts would result in an absurdity—defendant would retain less (60 percent) for the accounts with legal action than for the accounts without legal action (72 percent). The accounts with legal action require more work and expense for defendant (such as attorney fees and costs for which defendant was responsible under the 2006 and 2008 agreements), so making less money on those accounts is nonsensical.

Defendant's claim that it did not know about new payment terms until June 2014 weighs against defendant's interpretation. Defendant's assertion that its former owner did not read the agreements and did not know they contained new terms when he

signed them would mean he could not have intended to change the payment terms. We interpret a contract according to "the mutual intention of the parties as it existed at the time of contracting" (Civ. Code, § 1636), not an interpretation discovered six or eight years later.

Finally, at argument, defendant's counsel conceded both parties intended in 2006 and 2008 for the payment terms to carry over unchanged from the 1999 agreement. Because the undisputed evidence established that the parties intended the payment terms to remain the same from the 1999 agreement to the 2006 and 2008 agreements, defendant's argument that it overpaid plaintiff is unsupported.

2. Purchase of Accounts

The parties also dispute whether the 2006 and 2008 agreements were purchase agreements or service agreements with an option to purchase, but their interpretations of the pertinent terms on this point are materially consistent. They agree the agreements required defendant to pay 2 percent of an account's balance in the 37th month after the account was consigned to defendant. Defendant states the 2 percent payment was due "on the date of consignment in the 37th month." Plaintiff says it was due "within the 37th month." Their interpretation comports with the contract language requiring monthly sale dates based on the consignment of accounts and a 2 percent payment based on the account balance on the first business day of the 37th month after consignment.

Defendant does not contend it ever made a 2 percent payment in month 37. Instead, based on its overpayment theory, defendant argues it paid the full amount due on all accounts as

far back as 2004 and is entitled to keep everything it collected after month 36. Plaintiff argues defendant never exercised the purchase option and instead continued servicing the accounts and properly remitting 72 percent and 60 percent of collections.

In an option agreement, the seller "'offers to sell the subject property at a specified price or upon specified terms and agrees, in view of the payment received, that he will hold the offer open for the fixed time. Upon the lapse of that time the matter is completely ended and the offer is withdrawn.' [Citation.]" (*Steiner v. Thexton* (2010) 48 Cal.4th 411, 418 (*Steiner*).) "'An option is transformed into a contract of purchase and sale when there is an unconditional, unqualified acceptance by the optionee of the offer in harmony with the terms of the option and within the time span of the option contract. [Citation.]' [Citation.]" (*Id.* at p. 420.)

The purchase terms of the 2006 and 2008 agreements satisfy the definition of an option agreement. Plaintiff offered to sell accounts for the price of the remittances plus final payments of 2 percent of the account balances made in month 37. All accounts with a payment stream or settlement payment were part of the option. Setting aside the unsupported overpayment theory, the undisputed evidence establishes defendant did not exercise the option by making the 2 percent payments in month 37. A witness for plaintiff testified no such payments were made. Defendant's owner during the relevant period testified defendant did not purchase any accounts. And, as defendant's counsel conceded in the trial court, defendant did not take responsibility

for maintenance and reporting of account status, as required after an account purchase.[4]

Once the time to exercise an option lapses, "'the offer is withdrawn.'" (*Steiner, supra*, 48 Cal.4th at p. 418.) Thus, after an account was consigned to defendant for 37 months without a final 2 percent payment, the option to purchase that account ended. Defendant contends that whether or not it purchased the accounts, the agreements do not require any further remittances to plaintiff after month 37. Defendant is correct that the agreements do not expressly refer to payments after month 37. However, again the parties' conduct prior to the dispute—defendant's continued debt collection and remittances of 72 percent and 60 percent—shows the parties mutually understood that so long as defendant continued servicing the accounts, it was entitled to retain 28 percent and 40 percent of the collections and was required to remit 72 percent and 60 percent.

Having resolved the conflicting interpretations, we now turn to defendant's arguments about the trial court's sustaining of the demurrer and granting of summary judgment for plaintiff.

C. *The Demurrer to the Second Amended Cross-Complaint*

The brunt of defendant's argument is that the trial court improperly sustained the demurrer to the second amended cross-complaint because defendant's contract interpretation was

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[4] At oral argument on appeal, defendant's counsel asserted defendant had undertaken these responsibilities, but did not identify evidence in the record supporting the assertion.

correct and plaintiff's was wrong. But as explained, defendant's interpretation does not withstand scrutiny.[5]

Defendant also asserts the trial court did not address defendant's claim for reimbursement of attorney fees and costs incurred in collecting on the accounts.[6] The contractual basis for the claimed reimbursement is murky. At oral argument, defendant referenced a section of the 2006 and 2008 agreements on "Withdrawal of Assigned Accounts," which applies when plaintiff withdraws an account under certain conditions and requires plaintiff to reimburse defendant for court costs expended on a withdrawn account up to $2,500. But defendant did not allege the withdrawal section applied or the conditions to withdraw an account existed. To the contrary, defendant alleged the accounts it held as of the time of the dispute had not been withdrawn.[7]

Defendant simply did not allege any contractual right to reimbursement of fees and costs. The second amended cross-complaint sought, *as consequential damages*, a refund of attorney

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[5] Defendant does not argue on appeal, as it did in the trial court, that plaintiff was not entitled to modify the agreements and, when defendant rejected the modifications, terminate them.

[6] Defendant did not make this argument in its demurrer opposition, which may be why the trial court did not mention it.

[7] Defendant may also be referring to a provision in the 2008 agreement requiring plaintiff to reimburse defendant "for actual expenses incurred in the litigation of an account if such litigation is terminated by [plaintiff] up to a maximum of $5,000 out-of-pocket." But defendant's cross-complaints did not allege plaintiff terminated litigation of an account and did not request reimbursement under that provision.

fees and costs incurred to obtain judgments on accounts, and the third amended cross-complaint referred only to overpaid remittances.

Defendant next argues that the trial court wrongfully characterized the involuntary trust/unjust enrichment cause of action as a tort claim, when it should have been treated as a contract claim. However it is characterized, that cause of action depends on the same mistaken contract interpretation as the breach of contract causes of action and fails for the same reasons.

Finally, defendant maintains the court should have allowed it to plead causes of action concerning the alleged overpayment beyond just an accounting claim. But defendant does not identify any cause of action it could have pled that would not be dependent on its faulty contract interpretation. Accordingly, defendant has not shown the trial court abused its discretion in sustaining the demurrer with limited leave to amend.

D. *The Summary Judgment Motion*

Defendant repeats these points in arguing against the trial court's summary judgment ruling. It contends that its contract interpretation is correct and the trial court got it wrong. As explained above, we do not agree. Defendant also asserts the trial court did not consider its claim for costs and attorney fees recoverable under the agreements. Again, we disagree with defendant's interpretation that, upon termination, the 2008 agreement required plaintiff to reimburse the attorney fees and costs defendant incurred in collecting on the accounts.

IV. DISPOSITION

The judgment is affirmed. Plaintiff Wells Fargo Bank, N.A. shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SEIGLE, J.*

We concur:

MOOR, Acting P. J.

KIM, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.